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COMMENTS

ANNUAL FEDERAL DEFICIT SPENDING: SENDING THE JUDICIARY TO THE RESCUE

I. INTRODUCTION

The United States' national debt, fueled by the annual federal budget deficit,¹ is now a staggering \$4 trillion.² The 1993 deficit is forecasted to be \$300 billion,³ and the annual amount is expected to grow to \$400 billion in the next ten years.⁴ Financing the interest on the debt amounts to fifteen percent of the national budget,⁵ or \$200 billion annually.⁶ In 1992, the estimated percentage of the deficit compared to gross domestic product was a staggering seventy percent.⁷

During his 1992 campaign, President Clinton pledged to reduce the annual deficit amount by one-half.⁸ However, prior to taking office, Clinton realized this goal was too ambitious given current economic conditions and the current budget process.⁹ During his first year as president, Clinton

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1. A deficit is "an excess of expenditure over revenue." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 333 (Frederick C. Mish et al. eds., 9th ed. 1989) [hereinafter WEBSTER'S]. Deficit spending is "the spending of public funds raised by borrowing rather than by taxation." *Id.*

2. 139 CONG. REC. S10533 (1993) (interestingly, this amount is five times the amount it was when Ronald Reagan took office in 1980). See also Don L. Boroughs et al., *What's Wrong with the American Economy*, U.S. NEWS & WORLD REP., Nov. 2, 1992, at 36, 37.

3. Boroughs, *supra* note 2, at 37. If nothing is done, the debt will climb to \$7 trillion by the turn of the century. 139 CONG. REC. S10533 (1993).

4. 139 CONG. REC. S10518-19 (1993).

5. Boroughs, *supra* note 2, at 51.

6. Bill Mintz, *What You Should Know About the Deficit; \$327 Billion Shortfall Hits Americans Where They Live*, HOUSTON CHRON., Jan. 17, 1993, at 1.

7. Boroughs, *supra* note 2, at 43.

8. William Neikirk, *Clinton Economic Challenge: Find Money to Rebuild*, CHI. TRIB., Nov. 5, 1992, at 1, 34.

9. Because the 1992 deficit was \$130 billion higher than it was in 1991, Clinton has been forced to reject his planned middle-class tax cuts and will have to reduce originally planned spending. Curtis Wilkie & Peter G. Gosselin,

has tried many methods to cut spending, yet spending projections do not add up to an overall reduction in the deficit.¹⁰ In fact, during the 1993 budgetary process, individual Congress members made twenty-nine attempts to cut spending, but Congress ultimately rejected all of these cuts.¹¹ Clinton has also backed off of his promise to not tax the middle class.¹² The budget, as it now stands, includes an estimated total deficit reduction of only \$500 billion over the next three years.¹³ Whether the deficit will actually be reduced is very questionable.

What does this huge debt mean to our country, and what can be done to solve the problem? While the Clinton administration addresses the deficit problem, along with trying to stimulate a stagnant economy, could a group of taxpayers undertake a legal challenge to decrease or curtail deficit spending? Could a group of citizens or members of Congress interested in stopping the growth of the federal deficit sue the federal government to force a balanced budget? Would the judiciary be willing to address this ostensibly political issue?

This comment addresses whether the judiciary should review a suit challenging the constitutionality of annual federal deficit spending. Following a historical background of suggested methods to curb the deficit and the constitutional requirements for the judiciary to review a case, this comment considers whether parties would have standing¹⁴ to sue the

Aides Say Clinton Camp Knew of Higher Deficit Estimates; Before Election, Aides Knew Campaign Pledge Hard to Meet, BOSTON GLOBE, Jan. 17, 1993, at 10.

10. 139 CONG. REC. S10531-32 (1993).

11. 139 CONG. REC. S10518 (1993).

12. 139 CONG. REC. H6299 (1993).

13. *Id.*

14. Standing to sue is a principle required by the courts where:

[A] party [must have a] sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court; it is the right to take the initial step that frames legal issues for ultimate adjudication by court or jury. *State Ex Rel. Cartwright v. Oklahoma Tax Comm'n* Okl., 653 P.2d 1230, 1232 (Oklahoma 1982). The requirement of "standing" is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation. *Guidry v. Roberts*, 331 So. 2d 44, 50 (L.A. Court of Appeals 1976) Standing is a jurisdictional issue which concerns power of federal courts to hear and decide cases and does not concern ultimate merits of substantive claims involved in the

government and whether a federal court would find a justiciable controversy.¹⁵ The judiciary is urged to adjudicate any suit challenging the constitutionality of annual federal deficit spending. Additionally, Congress could confer original jurisdiction to the United States Supreme Court to adjudicate all challenges to deficit spending.

II. BACKGROUND

To better understand the national debt, the following provides a brief synopsis of our nation's debt problems and attempts to resolve annual deficit spending. Following this synopsis is a discussion of the judicial constraints a court would face if annual federal deficit spending were challenged.

action. *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 695 (D.C.Pa 1973) The doctrine emanates from the case or controversy requirement of the Constitution and from general principles of judicial administration, and seeks to insure that the plaintiff has alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness. *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 692 (E.D.Va. 1973).

Standing is a requirement that the plaintiffs have been injured or been threatened with injury by governmental action complained of, and focuses on the question of whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable. *Carolina Environmental Study Group, Inc. v. U.S. Atomic Energy Comm'n*, 431 F. Supp. 203, 218 (D.C.N.C. 1977). [The] essence of standing is that no person is entitled to assail the constitutionality of an ordinance or statute except as he himself is adversely affected by it. *Sandoval v. Ryan*, Colo. App. 535 P.2d 244, 247 (1975).

BLACK'S LAW DICTIONARY 1405 (6th ed. 1990) [hereinafter BLACK'S].

15. A justiciable controversy is:

A controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it; rights must be declared upon existing state of facts and not upon state of facts that may or may not arise in future. A question as may properly come before a tribunal for decision. *Duart Mfg. Co. v. Philad. Co.*, 30 F. Supp. 777, 779, 780 (D.C.Del. 1939). Courts will only consider a "justiciable" controversy, as distinguished from a hypothetical difference or dispute or one that is academic or moot. *Aetna Life Ins. Co. v. Hawthorn*, 300 U.S. 227, 239 (1937). Term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. *State v. Nardini*, 445 A. 2d 304, 307 (1982).

Id. at 865.

A. *History of the National Debt*

Our nation began with a staggering debt that was almost six times the current ratio of debt to income.¹⁶ The framers of the United States Constitution abhorred the idea that an immediate reduction of the debt was not in sight and insisted that the debt be reduced as soon as possible.¹⁷ While the Constitution was being drafted, Alexander Hamilton expressed his humiliation that the new nation "owe[d] debts to foreigners and to our own citizens. . . . These remain without any proper or satisfactory provision for their discharge."¹⁸ The framers of the Constitution envisioned a national system where monies would be spent only as they became available.¹⁹ Therefore, debt would be incurred only in emergency situations, such as war.²⁰

Reducing this debt was actually addressed, and by 1849, revenues exceeded expenditures.²¹ Until 1932, balanced or surplus budgets were the norm.²² However, during the Great Depression, the New Deal created spending pressures that encouraged deficit spending.²³ Since 1930, there have been only eight surplus years,²⁴ and our country has not had a budget surplus since 1969.²⁵ If deficit spending is left unchecked, the national debt will most certainly continue to grow.²⁶

Lack of a precise means to enforce or even encourage a balanced budget has resulted in continued deficit spending.²⁷ Reducing the annual deficit is critical to the country's eco-

16. Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 9 (1986).

17. S. REP. NO. 162, 99th Cong., 1st Sess. 1, 22 (1985).

18. THE FEDERALIST NO. 15, at 91 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

19. "[T]hat in the usual progress of things the necessities of a nation in every stage of its existence will be found at least equal to its resources." THE FEDERALIST NO. 30, at 190 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

20. See *id.* at 192. "In the modern system of war, nations the most wealthy are obliged to recourse to large loans." *Id.* at 192.

21. S. REP. NO. 162, 99th Cong., 1st Sess. 1, 39 (1985).

22. *Id.*

23. *Id.* at 24.

24. *Id.* at 39-40.

25. *Id.* at 40.

26. "[T]he federal budget deficit will remain between \$244 billion and \$331 billion until at least 1997." Borroughs, *supra* note 2, at 51.

27. See generally *infra* text accompanying notes 240-257.

conomic health.²⁸ The higher the debt rises, the more tax revenue is necessary to finance the debt.²⁹ Congress and the President have continually emphasized the need to reduce the deficit.³⁰ The budget deficit is an increasingly important topic in presidential and congressional campaigning, draws much media attention, and is often blamed for the current economic conditions. Yet, budget deficits continue in an upward spiral.

The cause of the debt is often blamed on "log-rolling"³¹ or "pork-barrel"³² spending. As "pork-barrel" spending continues, our deficit grows.³³ The deficit outlook remains bleak. With re-election campaigns always around the corner, the legislative and executive branches are unwilling to make difficult decisions involving cuts in the budget.³⁴ Incumbent members of Congress fear voter reprisal for budget cutbacks, and thus our public debt continues to grow.³⁵ In effect, members of Congress have placed re-election interests above the public's interests in controlling the debt.

28. Neikirk, *supra* note 8, at 24.

29. *Id.* at 24.

30. See, e.g., S. REP. NO. 162, 99th Cong., 1st Sess. 1 (1985). See also Mintz, *supra* note 6, at 1.

31. Legislative log-rolling is best described as a large bill that has many different purposes. BLACK'S, *supra* note 14, at 942. For instance, a "log-rolled" bill may include appropriations for child care and also appropriations for AIDS funding.

32. Pork-barrel spending refers to situations where "a government project or appropriation yield[s] benefits . . . to a political district and its political representative." WEBSTER'S, *supra* note 1, at 916. Recently, "pork-barrel" federal spending can be blamed for expenditures such as renovation of Lawrence Welk's birthplace, and research on prickly pears. Mintz, *supra* note 6, at 1. One member of Congress has aptly described "pork barrel" spending on a bill as lard[ing] it up with all kinds of junk [to] get Member's support." 139 CONG. REC. S10531-32 (daily ed. August 5, 1993).

33. See *infra* text accompanying notes 86-94.

34. See S. REP. NO. 162, 99th Cong., 1st Sess. 3 (1985):

Members of Congress, thus, are free to respond to the concentrated pressures of spending interest groups and reap the political advantages of doing so - without having to reap concomitant political disadvantages by reducing spending programs favored by some other spending interests or by expressly raising taxes This result is an essentially un-democratic and unresponsive process that enables members of Congress to avoid ultimate accountability for their spending and taxing decisions.

Id.

35. 139 CONG. REC. S10531-32 (daily ed. August 5, 1993). "Budget cuts will never materialize because [Congress does] not have the courage and guts to stand up and vote the cuts now." *Id.*

B. *Constitutional Powers of Congressional Spending*

Just how does Congress believe it has the power to spend beyond revenues? The U.S. Constitution grants the power to Congress to "provide for the common Defence and general Welfare of the United States."³⁶ Among these powers is the power "[t]o borrow Money on the credit of the United States."³⁷ The Constitution does not provide an answer to whether it is appropriate to spend beyond revenues in periods of peace.³⁸ The United States Congress, however, has acknowledged that debt should be incurred only for emergency purposes.³⁹ Congress has also expressed concern about the effects of the public debt on the nation's economy.⁴⁰ But why does Congress continue to spend monies beyond its means? Is there any Constitutional limitation?

1. *Limitations on Spending*

If deficit spending is in fact constitutional, what limitations does Congress face relative to the amount of money it may borrow? The Constitution does not provide an answer. Therefore, the meaning of the power to borrow must be interpreted. Generally, the meaning of ambiguous phrases is left to Congressional interpretation.⁴¹ Where Congress crosses the constitutional line, however, the courts must intervene.⁴²

36. U.S. CONST. art. I, § 8, cl. 1.

37. U.S. CONST. art. I, § 8, cl. 2. Further, the Fourteenth Amendment provides that the validity of the United States' public debt "shall not be questioned." U.S. CONST. amend. XIV, § 4. In fact, it appears that the Fourteenth Amendment was adopted in order to prevent Congress from "attack[ing] the validity" of the debt. *Perry v. United States*, 294 U.S. 330, 350-54 (1935). Congress, therefore, cannot attempt to cancel the debts of the country and is not free to ignore the country's pledges. *Id.* at 350-51.

38. See generally Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988). "Students of the Constitution have generally assumed that Congress has exclusive authority to construe and implement the appropriations clause and thus have not considered the possibility that Congress itself may violate the clause." *Id.* at 1345 n.5.

39. S. REP. NO. 162, 99th Cong., 1st Sess. 24 (1985) ("Congress attributes the nation's economic problems to the debt and an 'unwritten constitution[al]' requirement of balanced budgets and a virtual absence of external constraints upon the ability of Congress to spend.").

40. *Id.*

41. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-10 (1819) ("The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means. . .").

42. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Congressional appropriations cannot be inconsistent with the Constitution.⁴³ In this situation, a dilemma arises because the Constitution explicitly grants the power to Congress to borrow money,⁴⁴ but is silent as to when and where exercising this power is appropriate.⁴⁵ The executive branch is limited to spending monies that are appropriated by Congress.⁴⁶ It appears, however, that Congressional spending is limited only to that which is "necessary and proper."⁴⁷

The limitations of the Necessary and Proper Clause were vigorously debated, both before and immediately after the inception of the Constitution.⁴⁸ The judiciary historically has been deferential when asked to define the meaning of the Necessary and Proper Clause, interpreting the clause very broadly and construing Congress' powers to tax and spend expansively.⁴⁹ As a result, the Necessary and Proper Clause is

43. See, e.g., *id.* ("The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.").

44. See *supra* text accompanying notes 36-40.

45. See *supra* text accompanying notes 36-40.

46. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." U.S. CONST. art. I, § 9, cl. 7.

47. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." U.S. CONST. art. I, § 8, cl. 18.

48. In discussing both the Necessary and Proper Clause and the Supremacy Clause, Alexander Hamilton wrote:

These two clauses have been the sources of much virulent invective and petulant declamation against the proposed constitution, they have been held up to the people, in all the exaggerated colours of misrepresentation, as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article.

THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-13 (1819).

49. A broad interpretation is most apparent by examining the meaning of the Interstate Commerce Clause where Congress has found it "necessary and proper" to regulate seemingly unconnected areas of the law. See, e.g., *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226 (1983) (finding regulations for age discrimination of game wardens appropriate under Commerce Clause); *Perez v. United States*, 402 U.S. 146 (1971) (loansharking is in the stream of interstate commerce even if activities do not directly affect out-of-state commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964)

often used by Congress as a catch-all to spend, tax, or regulate broadly.⁵⁰ The framers of the Constitution, however, recognized that the Court is the final interpreter of the document.⁵¹

Because the limitations on Congress' powers to borrow have not been addressed by the Court, Congress is left to determine whether continuous deficit spending is within its powers. Critics argue that Congress does not really have the ability and drive to decide matters of constitutional import such as the limitation of Congressional spending.⁵² This argument suggests that each member's main goal is to promote the preferences of his or her own constituents in hopes of continued re-election.⁵³ In fact, the legislature has been accused of deferring matters of constitutional determination to the courts as opposed to addressing these matters head-on.⁵⁴ Perhaps the individual member does not have the ability to separate his or her local concerns from considering whether annual deficit spending is unconstitutional.⁵⁵

In addition to questioning whether annual deficit spending is "necessary and proper," another challenge to the deficit is that it denies to future generations certain constitutional rights such as equal protection, the right to representation, and the right to majority rule.⁵⁶ This argument purports that the present generation unconstitutionally benefits from deficit spending and pushes the burden to repay the deficit onto future taxpayers.⁵⁷ The annual deficit is therefore "analogous to race and geographical discrimination."⁵⁸ Future generations are not allowed to vote on legislation that will eventually affect them.⁵⁹ Although this is a novel concept, a challenge before a court is unlikely to prevail. The courts

(finding regulation that forbids hotels to refuse to rent to racial minorities is appropriate regulation under Commerce Clause powers).

50. See U.S. CONST. art. I, § 8, cl. 18.

51. "It is, emphatically, the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

52. See, e.g., Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983).

53. See, e.g., *id.*

54. *Id.* at 587-88.

55. *Id.* at 588.

56. See Lester G. Lindley, *The Deficit and the Constitution: A Betrayal of Fundamental Values*, 11 HAMLINE J. PUB. LAW & POL'Y. 255 (1985).

57. *Id.* at 255-56.

58. *Id.* at 257.

59. *Id.* at 258.

have held that a concrete injury must be present for remedial action.⁶⁰ Since future generations challenging deficit spending would be alleging they will be harmed in the future, the harm has not yet occurred. Therefore, "future generations," whomever they may be, would have no standing to sue.⁶¹

2. *The Balance of Powers and Congressional Spending*

The United States Constitution was developed to achieve separate yet balanced power among the legislative, executive, and judicial branches of government.⁶² Should Congress' ability to spend beyond revenues be checked by the balance of powers? In fact, the balance-of-powers issue was addressed where both the legislative and executive branches were involved in the budgetary process.⁶³ Concerns about the infringement of the executive branch into the budgetary process forced Congress to change the executive branch's role in the process when President Richard Nixon impounded⁶⁴ monies appropriated by Congress.⁶⁵ As a result, additional legislation was passed to limit the executive's power to impound funds.⁶⁶ Therefore, the judiciary may be reluctant to become involved.

With respect to the power to tax and spend, Congress often refers to itself as the ultimate power in the budget pro-

60. See generally *infra* text accompanying notes 143-208 for a discussion of the standing requirements for various parties.

61. See generally *infra* text accompanying notes 143-208.

62. "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. . . . That the three great departments of power should be separate and distinct." THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

63. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress and executive must remain separate). See also Neil Devins, *Budget Reform and the Balance of Powers*, 31 WM. & MARY L. REV. 993, 1018 (1990) ("[T]he transfer of budgetary power from Congress to the President directly undermines majority rule."). Interestingly, Congress set up the executive branch to be an integral part of the budget-making process. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921) [hereinafter The 1921 Act].

64. Impounding of funds by the executive branch occurs when the President "precludes the obligation or expenditure of budget authority by Congress." BLACK'S, *supra* note 14, at 756.

65. See The Congressional Budget and Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. § 105 (1982), 2 U.S.C. §§ 621-88 (1982), and 31 U.S.C. (1976)) (which forced limitations on presidential impoundments) [hereinafter The 1974 Act].

66. See *id.*

cess, an assertion supported by the Constitution.⁶⁷ Congress has also suggested that the courts do not have the power to consider whether congressional spending legislation is appropriate, since this would infringe upon congressional powers.⁶⁸ Moreover, the courts have historically followed the theory that the legislature is best qualified to interpret the meaning of Article I powers, and therefore the courts will bow to legislative interpretation unless there appears to be a clear usurpation of constitutional powers.⁶⁹ This presumption of legislative validity is evident when examining the large number of adjudicated cases regarding Congress' power to regulate under the Commerce Clause and the broad interpretation the Court has given to the phrase.⁷⁰

C. *Attempts to Reduce the Deficit*

Congress has made many attempts to control and reduce the deficit. The following illustrates a few of these attempts.

1. *Legislation*

There have been many futile attempts by Congress to reduce the federal deficit, including congressional limits on agencies to prohibit spending beyond appropriations;⁷¹ an act that purposefully includes the President in the budgetary process;⁷² several attempts at controlling the deficit through legislative spending limits;⁷³ and recently, a five-year plan to

67. See U.S. CONST. art. I, § 8, cl. 1.

68. See S. REP. NO. 162, 99th Cong., 1st Sess. 1, 66 (1985).

69. So long as there is a rational relation of means to ends, the act will be held constitutional. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

70. See, e.g., *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264 (1981) (holding that there is a rational basis for Congress to regulate private mining under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111 (1942) (determining that a trivial impact on commerce is sufficient for Congress to regulate); *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that labor stoppage has substantial effect on commerce and Congress can regulate).

71. See, e.g., Act of May 1, 1820, ch. 52, § 6, 3 Stat. 567; Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230; Act of Mar. 3, 1905, ch. 1484, 33 Stat. 1214.

72. See The 1921 Act, *supra* note 63.

73. See, e.g., The 1974 Act, *supra* note 65; The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, amended by Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 [hereinafter Gramm-Rudman].

provide for additional reductions in the deficit.⁷⁴ These attempts have failed miserably.⁷⁵

In 1974, Congress made a significant attempt at budgetary reform through the Congressional Budget and Impoundment Control Act (The 1974 Act).⁷⁶ Prior to the 1974 Act, Congress addressed the budget in small, separate pieces and not as a whole.⁷⁷ The 1974 Act emphasized creating a more ordered budget process and placing controls on presidential impoundments.⁷⁸ The 1974 Act created new committees, a new budgetary process, new timetables for fiscal years, and new deficit limits.⁷⁹ Adherence to the strict timetable schedules lasted only two years.⁸⁰ Further, the 1974 Act did not lead to a budgetary balance.⁸¹ The 1974 Act, however, did force Congress to look at the budget's bottom line, as opposed to previously separating receipts from expenditures.⁸²

Continued attempts to reduce the deficit were made in 1978⁸³ and also in subsequent years.⁸⁴ However, since these attempts, Congress has effectively repealed the legislation by continuing to adopt annual budget deficits.⁸⁵

The most ambitious attempts by Congress to place strict controls on the budget process are found in the Balanced Budget and Emergency Deficit Control Act of 1985 (more commonly known as Gramm-Rudman).⁸⁶ Gramm-Rudman

74. The Budget Enforcement Act of 1990, Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388 (1990) (codified as amended at 2 U.S.C. §§ 901-22 (supp. II 1990)) [hereinafter The 1990 Act].

75. See *infra* text accompanying notes 76-99.

76. The 1974 Act, *supra* note 65.

77. Gary A. Loxley & Thomas F. Mitola, Comment, *The Congressional Budget and Impoundment Control Act of 1974: Gramm-Rudman and Beyond*, 14 OHIO N.U. L. REV. 329, 333 (1987).

78. The 1974 Act, *supra* note 65. See also Philip G. Joyce & Robert D. Reichauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429, 432 (1992).

79. The 1974 Act, *supra* note 65.

80. Loxley & Mitola, *supra* note 77, at 340.

81. In fact, the United States has had a budget deficit since 1969. S. REP. NO. 162, 99th Cong., 1st Sess. 1, 39 (1985).

82. Mikva, *supra* note 16, at 5.

83. Pub. L. No. 95-435, 92 Stat. 1051 (1978) (codified at 22 U.S.C. § 286e (1982)).

84. See generally Loxley & Mitola, *supra* note 77, at 334-45 for discussion of the many attempts by Congress to lower the deficit.

85. Wm. Craig Stubblebine, *Fiscal Balance and the Federal Constitution*, 11 GEO. MASON U.L. REV. 125, 132 (1988).

86. Gramm-Rudman, *supra* note 73.

called for a phased-in reduction of the deficit over a six-year period.⁸⁷ Ultimately, the deficit was to be reduced to zero by 1991.⁸⁸ Gramm-Rudman's demise began almost immediately.⁸⁹ In the first year of Gramm-Rudman's existence, Congress failed to meet its prescribed goals.⁹⁰ Additionally, a portion of Gramm-Rudman was deemed an unconstitutional breach of the balance of powers.⁹¹ Gramm-Rudman's provision for a one-house veto was also found unconstitutional.⁹² These successful constitutional challenges, and Congress' inability to meet Gramm-Rudman's goals, "triggered the . . . death knell of Gramm-Rudman."⁹³

In November 1990, yet another budget plan was passed by Congress (The 1990 Act).⁹⁴ This five-year plan provided for reductions in the deficit, an additional budgetary process change, and spending caps.⁹⁵ In its first year, the plan's application met with relative success.⁹⁶ The 1990 Act left loopholes for Congress to spend beyond its means. These loopholes give Congress a provision to spend above the budget in emergency situations and provide an allowance for economic fluctuations.⁹⁷ Additionally, Congress pushed some budgetary decisions into future years, which makes the first year appear successful, but which also makes it more difficult to meet the 1990 Act's goals in subsequent years.⁹⁸ The Clinton administration will therefore be forced to incorporate appropriations for the current year with appropriations from previous years.⁹⁹

2. *Proposed Constitutional Amendments*

A repeated suggestion to solve the nation's budgetary problems is through the use of constitutional amendments

87. *Id.*

88. *Id.*

89. See *infra* notes 90-93 and accompanying text.

90. See Loxley & Mitola, *supra* note 77, at 347.

91. *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress may not reserve to itself the power to remove an appointed executive officer).

92. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

93. Loxley & Mitola, *supra* note 77, at 347.

94. The 1990 Act, *supra* note 74.

95. *Id.*

96. See Joyce & Reischauer, *supra* note 78, at 430.

97. The 1990 Act, *supra* note 74.

98. See Joyce & Reischauer, *supra* note 78, at 440.

99. *Id.* at 440.

that require a balanced budget, allow the president a line-item veto, or require that all appropriations be the "same subject."¹⁰⁰ However, critics suggest that most of these proposals "merely pacify[] the public outcry against the growing budget deficit by proposing superficial alternatives of budget reform."¹⁰¹

a. *Proposed Amendments Requiring a Balanced Budget*

Congress has proposed several different constitutional amendments to require a balanced budget.¹⁰² The proposed amendments, however, have not been very strict, have left loopholes for congressional override, and most significantly, have not provided for enforcement in case Congress does not meet the amendment's requirements.¹⁰³ Suggested override provisions allow Congress to spend beyond revenues if there is a three-fifths approval by both the House and the Senate.¹⁰⁴ Congress defends the lack of enforceability provisions on the basis that the budget power is strictly within its own powers and that no other branch should, or constitutionally can, enforce any provisions of an amendment.¹⁰⁵ Therefore, Congress believes the judiciary should not, and cannot, become involved in the process of enforcing these constitutional amendments.¹⁰⁶

b. *Presidential Line-Item Veto*

Congress has also considered a constitutional amendment to grant the President a line-item veto.¹⁰⁷ A line-item veto would allow the President to veto any given item in the budget without being forced to veto or pass the package as a

100. See *infra* text accompanying notes 102-132.

101. Loxley & Mitola, *supra* note 77, at 358.

102. See *generally id.* at 334-45.

103. See *generally id.*

104. S. REP. NO. 162, 99th Cong., 1st Sess. 1, 2 (1985).

105. See *id.* at 64-71.

106. *Id.*

107. See S.J. RES. 30, 101st Cong., 1st Sess., 135 CONG. REC. S166 (daily ed. Jan. 25, 1989). Additionally, Congress has proposed legislation, as opposed to constitutional amendment, to grant the president the line-item veto, but the proposal failed to pass committee. S. REP. NO. 92, 99th Cong., 1st Sess. 1 (1985).

whole.¹⁰⁸ These proposals have included a provision for Congress to override the vetoed item by a two-thirds vote.¹⁰⁹

Critics argue that the line-item veto would shift the balance of powers by taking away purely congressional authority to spend and unconstitutionally giving that authority to the executive branch.¹¹⁰ Although Congress is bound by majority rule,¹¹¹ it must then achieve a two-thirds vote to override a single spending appropriation initially included in a bill passed by a majority vote.¹¹²

Critics also believe the line-item veto is inappropriate because it is subject to partisan politics.¹¹³ The President's political party will be reluctant to override a veto by its own President.¹¹⁴ Similarly, states with gubernatorial line-item vetoes are criticized that legislators "pad" the budget with politically popular appropriations, and thereby force the governor to make unpopular cuts through the exercise of the veto.¹¹⁵ Hence, the President will be reluctant to veto his or

108. See Courtney P. Odishaw, Note, *Curbing Legislative Chaos: Executive Choice or Congressional Responsibility?*, 74 IOWA L. REV. 227, 230 (1988).

109. *Id.* at 238. In fact, it has also been suggested that the President actually has the line-item veto and could simply go ahead and use it. See Stephen Glazier, *Reagan Already has Line Item Veto*, WALL ST. J., Dec. 4, 1987, at 14. Supposedly, this power lies explicitly in the Constitution. *Id.* ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it. . . ." U.S. CONST. art. I, § 7, cl. 2. "Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him" *Id.* cl. 3.) To date, however, no President has tested this ability.

110. See Devins, *supra* note 63, at 1018. "Indeed, the transfer of budgetary power from Congress to the President directly undermines majority rule."

111. See U.S. CONST. art. I, §§ 2, 3, 5, 7. To override a presidential veto, the House and Senate must gain two-thirds approval. *Id.* at § 7.

112. See U.S. CONST. art. I, § 7.

113. See Devins, *supra* note 63, at 1018. "This conclusion is buttressed by the fact that members of the President's party are extremely reluctant to override veto decisions."

114. See *id.*

115. *Id.* at 1005-06. "Legislators in states which have the line-item veto routinely 'pad' their budgets. It is a wonderful way for a Democratic-controlled legislature to put a Republican Governor on the spot: Let him be the one to line-item these issues that were either politically popular, or very emotional." *Id.* (quoting Line-Item Veto: Hearings on S.J. Res. 26, S.J. Res. 178, and S. 1921 Before the Sub. Comm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 21 (1984)).

her own party's budgetary items.¹¹⁶ Additionally, opponents of the line-item veto also believe that the veto would not be effective to control the deficit because any items vetoed would have little impact.¹¹⁷

By contrast, the executive branch favors the line-item veto, believing that the present process creates an unconstitutional imbalance of powers.¹¹⁸ It is therefore appropriate for the President to have the line-item veto, because it is presently so difficult and too politically unpopular for the President to veto a large bill when only one item does not meet the President's approval.¹¹⁹ Proponents believe that the line-item veto would generate large spending cuts because it would not force the President into vetoing "all-or-nothing . . . mega bills."¹²⁰ With a line-item veto, the President could cut wasteful items out of large bills without endangering other important provisions, thereby helping to restore the balance of powers.¹²¹

c. *Same-Subject Limitations*

An additional suggestion to curb spending is a constitutional amendment that requires all bills be limited to the "same subject."¹²² Similar to the line-item veto, the same-subject limitation would disallow omnibus¹²³ legislation.¹²⁴ States with same-subject provisions, however, have found it difficult to define the meaning of the term "same subject."¹²⁵ Some states require that the subjects be "reasonably germane" to one another.¹²⁶ The state of Florida requires bills to relate to only one "government function."¹²⁷

116. *Id.* at 1019.

117. *Id.* at 1014.

118. S. REP. NO. 92, 99th Cong., 1st Sess. 1, 12 (1985).

119. *See id.*

120. Devins, *supra* note 45, at 997.

121. *Id.* at 996-97.

122. *See* Nancy J. Townsend, Comment, *Single Subject Restrictions as an Alternative to the Line-Item Veto*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 227 n.4 (1985).

123. An omnibus bill is one that includes several separate and very different items in one act where the executive must approve, or veto, the entire bill. BLACK'S, *supra* note 14, at 1087.

124. *See* Odishaw, *supra* note 108, at 240.

125. *Id.* at 242.

126. *Id.*

127. *See id.* at 243.

Proponents believe the same-subject restriction may be an effective means to curb abusive legislative spending.¹²⁸ The amendment may help to prevent legislators from hiding obscure appropriations in large bills.¹²⁹ The same-subject proposal's worst enemy, however, may be Congress itself.¹³⁰ A member of Congress, accustomed to hiding obscure appropriations in large bills, may become exposed by the same-subject limitation and therefore not want to pass the amendment.¹³¹ If forced to choose an alternative, however, Congress may favor adoption of the same-subject amendment over the presidential line-item veto, because the same-subject requirement may pose fewer separation-of-powers problems.¹³² However, it does seem possible, if not inevitable, that the judiciary would be asked to interpret the term.

Regardless of efforts to pass a constitutional amendment, none of these proposals have been successful. Because we are left with the Constitution and with the interpretation of Congress that annual spending beyond means is appropriate, a challenge to that perception must be made. If a challenge were brought, would a court elect to adjudicate the issue?

D. *Historical Judicial Reluctance to Review Congressional Matters*

In order for the federal courts to review a matter of constitutional import, several tests must be met, including those of justiciability and standing.¹³³ The Court has suggested that specific appropriations matters should be left to congressional discretion and not be reviewed by the judiciary.¹³⁴ If a challenge involves matters beyond the validity of appropriations, however, and attacks the overall constitutionality of an action, judicial inquiry beyond mere deferential treatment

128. *Id.* at 245.

129. *Id.*

130. *Id.*

131. *Id.* at 246.

132. *Id.* at 247.

133. See generally *infra* text accompanying notes 143-227.

134. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447, 487-89 (1923). In fact, *Frothingham* suggests that Congress has the power to legislate on any matter that "touches upon the health, morals, education and prosperity of the people of the United States." *Id.* at 466 (emphasis added). Perhaps we can question whether the legislature is really improving the "prosperity" of our nation by imposing such onerous debt.

is appropriate.¹³⁵ In these situations, limitations on Congress "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."¹³⁶

Where the Supreme Court elects to review the validity of congressional actions, it has historically applied a great degree of deference to its review, usually beginning its analysis with the presumption that congressional actions are constitutional.¹³⁷ The Court generally will review only grievances flowing from specific enumerated clauses in the Constitution,¹³⁸ and is likely to give deference to "perceived," as compared to "actual," legislative intent.¹³⁹ When presented with different readings of a statute, the courts will defer to the obvious constitutional reading.¹⁴⁰

At this time, we do not know whether the Court would be similarly reluctant to review a challenge to annual deficit spending. In prior attacks on single appropriations, the Court has been concerned with standing¹⁴¹ or has not re-

135. "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In these situations, the Court may elect to take a more active role in the implementation of remedies to a problem, such as it has done in the racial segregation cases. *See, e.g., Brown v. Board of Educ.*, 349 U.S. 294 (1955).

136. *THE FEDERALIST* NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

137. "[W]hen Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. . . . [A] decree of unconstitutionality by [the] court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason." *United States v. Lovett*, 328 U.S. 303, 319 (1946) (Frankfurter, J., concurring).

138. The Court, above and beyond "the broad standards of fairness written into the Constitution (e.g. 'due process,' 'equal protection of the laws,' 'just compensation') and the division of power as between States and Nation . . . [will look at a] second class of constitutional issues derive[d] from very specific provisions of the Constitution." *Id.* at 321.

139. The judiciary is likely to give deference to legislative intent "so [as] to deal with Congressional enactments as to avoid their invalidation unless a road to any other decision is barred." *Id.* at 328.

140. "[W]hen the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States v. Delaware & Hudson Co.* 213 U.S. 366, 407 (1909).

141. *See infra* text accompanying notes 143-208.

viewed the challenge, fearing unconstitutional involvement in another branch of government.¹⁴²

1. *Standing*

In order for the courts to review a legislative act, the litigant must have standing to sue.¹⁴³ The main concern is whether the party challenging the Congressional action is the "proper party to request an adjudication of a particular issue."¹⁴⁴ Standing is present if the party can show injury in fact.¹⁴⁵

Courts apply different tests, depending on the status the party asserts as its basis for standing.¹⁴⁶ Several groups could challenge the constitutionality of federal deficit spending. These include taxpayers, citizens, or members of Congress.

a. *Taxpayer Standing*

An individual claiming that his or her taxpayer funds are being used in an inappropriate manner will generally have difficulty establishing standing to sue.¹⁴⁷ The Court, in *Flast*

142. See *infra* text accompanying notes 209-227.

143. See, e.g., *Frothingham v. Mellon*, 262 U.S. 447 (1923):

The party who invokes the power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488.

144. *Flast v. Cohen*, 392 U.S. 83, 83, 101 (1967) (standing found where taxpayers challenged federal spending as a violation of the Establishment and Free Exercise Clauses).

145. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (citations omitted); see also, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("The gist of the question of standing [is whether the party has] alleged such a personal stake in the outcome of the controversy as to assure [the] concrete adverseness which sharpens the presentation of issues. . . ."); *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 411 (1792) (the court must find a concrete injury; otherwise, the opinion will only be advisory, which is not allowed under the Constitution).

146. See *infra* text accompanying notes 147-208.

147. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-43 (1976) (the party must show a causal link between the defendant's action and the alleged injury); *Frothingham v. Mellon*, 262 U.S. 447, 487-88 (1923). For a party who attacks the validity of a specific appropriation, the standing hurdle is difficult to jump because the taxpayer's injury is deemed so minute and the case so tenuous. *Id.* Since the "interest in the moneys of the Treasury [is] shared with millions of others [and] is comparatively minute and indeterminable [a party who] suffers in some indefinite way in common with people" generally

v. Cohen,¹⁴⁸ however, allowed a taxpayer to sue where the taxpayer directly challenged the constitutionality of a spending program as opposed to an "incidental expenditure," and a "logical" nexus between the status asserted and the claim sought to be adjudicated" existed.¹⁴⁹ To establish such a nexus, the taxpayer must show that the questioned legislation relies on congressional power to tax and spend under the Constitution and that the program violates specific constitutional limits and not Congress' general powers.¹⁵⁰ While *Flast* is still good law, it is very difficult for a litigant to meet the strict standing test.¹⁵¹

The Constitution requires that the judiciary rule only on issues where there is a concrete "case or controversy."¹⁵² A concrete controversy exists where the court finds a causal link between the challenged action and the plaintiff's injury.¹⁵³ Causation need not be virtually certain, and the litigant need only show a "substantial likelihood" that the action challenged caused the injury.¹⁵⁴ The courts will also examine whether the action is capable of redress by the judiciary.¹⁵⁵ The Court has declined jurisdiction where it found the case

does not have standing to sue. *Id. Frothingham*, however, involved a challenge to a single appropriation, and the Court was concerned that to allow this kind of case could result in a proliferation of suits. *Id.* at 487. This case may be differentiated from a single challenge to all deficit spending, since one determination would make all other suits irrelevant.

148. 392 U.S. 83 (1968).

149. *Id.* at 102.

150. *Id.* at 92-94.

151. See, e.g., *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464 (1982) (holding there is no standing for taxpayers alleging an Establishment Clause violation where the government gave away real estate to a religious organization); *United States v. Richardson*, 418 U.S. 166 (1974) (holding taxpayer suing for use of funds by CIA does not have standing).

152. U.S. CONST. art. III, § 2. See also, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

153. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) ("Only concrete injury presents the factual context within which a court . . . is capable of making decisions.").

154. *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978).

155. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) ("It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability [of redress].").

would be difficult to adjudicate,¹⁵⁶ or where the Court's power to redress the problem was speculative.¹⁵⁷

Some Supreme Court Justices have indicated that if there is an allegation that a constitutional provision was violated, the litigant automatically suffers sufficient injury to sue.¹⁵⁸ Justice Brennan, in *Valley Forge Christian College v. Americans United*,¹⁵⁹ suggested that standing should not be the first inquiry.¹⁶⁰ Instead, the first question should be whether the Constitution itself defines injury.¹⁶¹ Historically, however, strict injury requirements have been applied such that an allegation of unconstitutional behavior does not provide for automatic standing.¹⁶²

b. *Citizen Standing*

The U.S. Supreme Court has rejected the notion that citizens can sue for a generalized injury.¹⁶³ This rejection is primarily based on the challenger's inability to show a particular concrete injury.¹⁶⁴ The Court has rationalized its position by indicating that this type of standing has "no boundaries."¹⁶⁵ Hence, it has refused to allow cases consisting of a "widespread class" encompassing every citizen's "right to

156. See, e.g., *Schlesinger*, 418 U.S. at 220 (holding that class action on behalf of all United States citizens is too generalized and too difficult to adjudicate); *United States v. Richardson*, 418 U.S. 166 (1974) (holding claim of taxpayer funds used for CIA purposes too tenuous for redress).

157. See, e.g., *Duke Power Co.*, 438 U.S. at 74 ("The more difficult step in the standing inquiry is establishing that . . . the exercise of the Court's remedial powers would redress the claimed injury.").

158. See *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464, 492 (1982) (Brennan, J., dissenting). In fact, Justice Brennan suggests that a person should not be denied adjudication of a constitutional deprivation simply under the "rhetoric" that standing limitations impose. *Id.* at 493.

159. *Id.*

160. *Id.*

161. *Id.* at 492.

162. See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). ("The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.").

163. See *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (holding that taxpayer's allegation of injury from statutory appropriation to states was too generalized).

164. See, e.g., *Schlesinger*, 418 U.S. at 227. "[S]tanding to sue may not be predicated upon an interest . . . held in common by all members of the public . . ." *Id.* at 220.

165. *Id.* at 227.

have a government that operates constitutionally.”¹⁶⁶ Because citizens must be able to show injury suffered from unconstitutional action, a class, such as all American citizens, will have a difficult time showing concrete injury from a specific challenge to congressional spending.¹⁶⁷ Whether a citizen, or group of citizens, would have sufficient injury to challenge the overall constitutionality of annual deficit spending has not yet been brought to the Court’s attention.

c. *Congressional Standing*

Standing for a member of Congress was addressed where the member sued the executive branch¹⁶⁸ and where a member challenged the denial of the legislator’s right to participate in the legislative process.¹⁶⁹ Further, standing for a member suing Congress has also been addressed.¹⁷⁰ The primary case decided by the U.S. Supreme Court involved finding standing for a state legislator.¹⁷¹ The legislator in *Coleman v. Miller*¹⁷² alleged he was denied access to the legislative process where he voted against ratification of a bill and state officials sought to implement the bill.¹⁷³ In *Coleman*, the Court granted standing to Kansas senators who had voted against a Child Labor Amendment to the Federal Con-

166. *Id.*

167. See *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464, 485 (1982). The parties “fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error. . . .” *Id.* at 485. But see *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-87 (1973) (standing found where group alleged loss of enjoyment of natural resources although there was no economic harm). In fact, the Court in *Students* did not seem concerned that the injury is shared by many people. *Id.* at 648.

168. See *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir. 1978) *cert. denied*, 439 U.S. 997 (1978) (members of Congress alleging unconstitutional composition of Federal Reserve System).

169. See *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966) (both cases involved the denial of a Congress member’s seat in legislature).

170. See *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (holding senator has standing to sue regarding pocket veto); *Coleman v. Miller* 307 U.S. 433 (1939) (holding that a state congressman has an interest in his own vote). But see *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977) (holding that a congressman did not have concrete injury sufficient for standing to sue regarding illegal activities of the CIA).

171. *Coleman*, 307 U.S. at 433.

172. *Id.*

173. *Id.*

stitution.¹⁷⁴ The legislative vote was evenly split, and the Lieutenant Governor cast a vote in favor of the legislation.¹⁷⁵ The "passage" of the resolution was challenged by the senators who had voted against the bill, stating that the bill had not properly received a majority vote.¹⁷⁶ The Court found that the senators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes," and therefore they suffered sufficient injury to find standing.¹⁷⁷

Status as a member of Congress is not, on its own, sufficient grounds for standing unless a concrete injury can be shown.¹⁷⁸ The member must be able to show that his or her congressional powers have in some way been abridged.¹⁷⁹ He or she must show that some right, such as voting, has been denied in order to demonstrate a concrete injury.¹⁸⁰ Further, a court will ask if the injury "bear[s] upon . . . [the] plaintiffs' quite distinct and different duties" as a legislator in order to find standing.¹⁸¹

As a further proposition, a member of Congress may also allege that he or she has been indirectly injured as a result of injury to the entire Congressional institution, which "in turn injures him."¹⁸² It is most important to remember that there are no special standards for Congressional standing.¹⁸³ As with other balance-of-powers concerns, when a court considers whether a Congress member has been injured, it will also consider whether the court's action unconstitutionally inter-

174. *Id.* at 435.

175. *Coleman v. Miller*, 307 U.S. 433, 436 (1939).

176. *Id.* at 438.

177. *Id.* at 438, 446.

178. *See e.g.*, *Harrington v. Bush*, 553 F.2d 190, 197-98 n.32 (D.C. Cir. 1977) ("[G]eneralized allegations do not provide a court with enough information as to the particular interests at stake in the litigation. Thus, legislators, like all other plaintiffs, must be precise in defining the particular interests which they seek to vindicate in the federal court system.").

179. *See id.*

180. *See Coleman v. Miller*, 207 U.S. 433, 438 (1939).

181. *Harrington*, 553 F.2d at 199 (quoting *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C.Cir. 1973)).

182. *Id.* at n.41. ("Thus, the argument related to institutional injury is an indirect or derivative argument in which the harm is traced through from the institution to the individual member.").

183. *Harrington v. Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977). The standing requirements are the same as for any other litigant regardless of whether the interests and injuries asserted are different. *Id.*

feres with another branch of government.¹⁸⁴ The courts' failure to make these considerations could "lead inevitably to the intrusion of the courts into the proper affairs of the coequal branches of government."¹⁸⁵ Thus, where there is a question of separation of powers, the court will apply a very strict requirement of "concrete, personal injury . . . so that federal courts will not be thrust into the role of 'continuing monitors of the wisdom and soundness of Executive [or legislative] action.'"¹⁸⁶

Recently, a district court found that several members of Congress had standing when they banded together to enjoin President Bush for his activities in the Persian Gulf.¹⁸⁷ The members challenged activities by the President that had not yet received congressional approval.¹⁸⁸ The members alleged they were deprived of "the voice to which they are entitled under the Constitution."¹⁸⁹ Because the issue was not ripe for judgment,¹⁹⁰ the question of standing did not go to a higher court.¹⁹¹ The issue later became moot¹⁹² and was not

184. See *supra* text accompanying notes 62-70. "In deference to the fundamental constitutional principle of separation of powers, the judiciary must take special care to avoid intruding into a constitutionally delineated prerogative of the Legislative Branch." *Harrington*, 553 F.2d at 214.

185. *Harrington*, 553 F.2d at 214.

186. *Id.* at 215 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

187. *Dellums v. Bush*, 752 F. Supp. 1141 (D.C. Cir. 1990).

188. *Id.*

189. *Id.* at 1144.

190. A case is ripe when there is "a substantial controversy, between parties having adverse legal interests, or sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972) (citation omitted). See also BLACK'S, *supra* note 14, at 1328. In *Dellums*, the court found the issue was not "ripe" because Congress had not yet voted on the matter and therefore had not yet asserted its constitutional authority. *Dellums*, 752 F. Supp. at 1149-50. Therefore, there was not yet a true confrontation between the legislative and executive branches. *Id.* Further, the court found the issue not ripe because the executive branch had not yet shown a "commitment to a definitive course of action" against Iraq to substantiate a final decision of war. *Id.* at 1152.

191. *Dellums*, 752 F. Supp. at 1144 n.3.

192. A case becomes moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Leonhart v. McCormick*, 395 F. Supp. 1073, 1077 (W.D. Pa. 1975). "A question is moot where it presents no actual controversy or where the issues have ceased to exist." *Leak v. Lawson*, 353 N.E.2d 345, 347 (1976). See also BLACK'S, *supra* note 14, at 1008.

pursued.¹⁹³ It is noteworthy, however, that the court in *Dellums* believed that the judiciary has the power to adjudicate issues that impact very political areas, such as foreign affairs, that belong to other branches of government.¹⁹⁴

The courts also found congressional standing where a member of Congress challenged an act that allegedly granted unconstitutional powers to another branch.¹⁹⁵ In addition, members of Congress were found to have standing where they challenged the veto of a bill for which they had voted.¹⁹⁶ The senators were found to have standing based on the feeling that "[no] more essential interest could be asserted by a legislator."¹⁹⁷ It remains to be seen whether the Supreme Court would allow members of Congress to sue the congressional body regarding budgetary matters.

A member of Congress may also attempt to bring suit as a representative of his or her constituents.¹⁹⁸ Representational standing has been limited to issues such as nullification of a specific vote and has not expanded to the general participation in the legislative process.¹⁹⁹ Few members of Congress have brought suit as representatives of their constituents.²⁰⁰ The legislator who sues as the voters' representative may have a stronger case if private plaintiffs join the suit.²⁰¹ One appellate court, however, has not allowed repre-

193. Congress approved President Bush's actions in the Persian Gulf on January 12, 1991, making the challenge moot. See Sara Fritz & William Eaton, *Congress Authorizes Gulf War*, L.A. TIMES, January 13, 1991, at 1.

194. *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.C. Cir. 1990) "[I]t does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon [another branch's] affairs." *Id.*

195. See *Bowsher v. Synar*, 478 U.S. 714 (1986) (finding there was a constitutional infringement of the legislative branch on the executive branch; however, actual standing was granted to a private plaintiff and the issue was not pursued further).

196. *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). In *Kennedy*, the President said he would veto a bill, and then he did not act. *Id.* at 432. The parties who had approved the bill argued that the President's inaction caused the bill to become law. *Id.*

197. *Id.* at 436.

198. See, e.g., *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983) (standing found for Congress members suing on behalf of constituents).

199. *Harrington v. Bush*, 553 F.2d 190, 211-12 (D.C. Cir. 1977).

200. See, e.g., *Vander Jagt*, 699 F.2d at 1166.

201. *Id.* at 1169 n.4.

sentational standing.²⁰² Whether this method would be allowed to go forward in the Supreme Court is questionable.

The test for traditional representational standing to sue is found in *Hunt v. Washington State Apple Advertising Commission*.²⁰³ *Hunt* suggests that members of Congress would be able to show standing if the constituents themselves would have standing, the interests of the organization "are 'germane' to the organization's purpose[s]," and neither the claim nor the relief requires the individuals to participate in the action.²⁰⁴

Issues of ripeness are also matters where the judiciary will be concerned.²⁰⁵ For instance, congressional standing was rejected where the court felt the normal political process had not been given a chance to resolve the issue.²⁰⁶

Some suggest that the courts should be very cautious in granting congressional standing because the legislator, based on the nature of his or her office, has "special access to the political processes through which general constitutional grievances should find redress."²⁰⁷ Therefore, it is not often necessary for a member of Congress to seek redress through the courts, because he or she can seek such redress through the legislative process.²⁰⁸

202. *McKinney v. United States Dep't of the Treasury*, 614 F. Supp. 1226 (Ct. Int'l Trade 1985), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986). See also R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This Anyway?*, 62 NOTRE DAME L. REV. 1 (1986).

203. 432 U.S. 333 (1977).

204. *Id.* at 343.

205. See, e.g., *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) ("Basically, the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a . . . judgment.").

206. See *Goldwater v. Carter*, 444 U.S. 996, 997 (Powell, J. concurring) (holding confrontation between executive and legislative branches is not certain to occur). See also, e.g., *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 877 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981) (leaving the matter to be addressed by the Congress members' colleagues). Whether the political process and public concern acted upon through the voting process will eventually resolve such challenged issues is an open question.

207. *Goldwater*, 617 F.2d at 710. See also, e.g., *Singleton v. Wulff*, 428 U.S. 106 (1976).

208. *Goldwater*, 617 F.2d at 710. See also *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("Our system of government leaves many crucial decisions to the political processes.").

2. *Justiciability*

The courts may also decline to review matters based on the political question doctrine²⁰⁹ where a court determines it is unwise to decide the issues,²¹⁰ or where a court concludes issues are assigned by the Constitution to other branches of government.²¹¹

a. *Political Question Doctrine*

Courts look at several factors to decide whether a case is not justiciable based on the political question doctrine.²¹² These factors include the commitment of the issue to another coordinate branch of government, the lack of "judicially discoverable and manageable standards for resolving" the issue, the impossibility of deciding an issue without first determining policy, the risk that resolution could result in lack of respect for another branch of government, the possibility that the political decision is already made, or the potential for "embarrassment from multifarious pronouncements by various departments on one question."²¹³ If one of these factors is not present, "there should be no dismissal for non-justiciability on the ground of a political question's presence."²¹⁴ In looking at these various factors, the Supreme Court has declined to decide cases, for example, involving discipline of the militia, where the sole constitutional authority to regu-

209. See *infra* text accompanying notes 212-219. "Political questions" are those of which the "courts will refuse to take cognizance, or to decide on account of their purely political character, or because their determination would involve an encroachment upon the executive or legislative powers." BLACK'S, *supra* note 14, at 1158-59.

210. See *infra* text accompanying notes 220-227.

211. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962).

212. *Id.*

213. See *id.* at 217. In fact, it can be argued that the Court has actually become involved in areas that could be considered political or could be seen to embarrass another branch. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down congressional retention of right to exclude executive appointment from budgetary process); *INS. v. Chadha*, 466 U.S. 919 (1983) (striking down one-house veto provision); *United States v. Nixon*, 418 U.S. 683 (1974) (denying absolute immunity to the Presidential office); *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating death penalty statutes). See also Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 650 (1989) ("The irony is that . . . the role of the federal courts in managing public institutions and public policy ha[s] grown significantly.").

214. *Baker v. Carr*, 369 U.S. at 217.

late is with the congressional and executive branches,²¹⁵ and involving the constitutional amendment process.²¹⁶

The political question analysis may still be applied if a constitutional amendment to require a balanced budget were implemented and challenged.²¹⁷ Critics argue that the judiciary still may not be able to enforce the amendment's provisions, because doing so would exceed constitutional limits.²¹⁸ This premise suggests that notions such as standing and the political question doctrine are simply too problematic, and therefore the judiciary is not the proper organization to resolve these issues.²¹⁹

b. *Prudential Concerns*

The judiciary is not required to review all cases.²²⁰ The courts, at their own discretion, can refuse to review any case, as they deem appropriate.²²¹ The impact of the ability to deny review is illustrated by considering the large number of cases denied review by the Supreme Court.²²²

The ability to decline jurisdiction because the court does not find it "prudential" has been debated over the centuries.²²³ Justice Marshall, in *Cohen v. Virginia*,²²⁴ felt strongly that the courts should not decline jurisdiction at whim and rather must show good reason to deny review where a party appeals to the court and has standing to sue.²²⁵

215. See, e.g., *Gilligan v. Morgan*, 413 U.S. 1 (1973) (declining to review training, weaponry, and standing orders of the National Guard which are responsibilities vested in the legislative and executive branches).

216. See *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939) (holding that review of constitutional amendment ratification process is not within the bounds of judicial review).

217. See Gay A. Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1105 (1983) ("[F]inding the Amendment justiciable because of explicit textual assertion or judicial decision will alter the balance of powers in the federal government and at the same time transform current notions of justiciability.").

218. *Id.*

219. See *id.* at 1105-07.

220. In 1988, almost all of the Supreme Court's "mandatory" jurisdiction was eliminated by legislation, and the Court was given discretionary review by writ of certiorari. 102 Stat. 662, 28 U.S.C. § 1257 (1988).

221. *Id.*

222. Recently, the Supreme Court refused review of *all* cases on two appellate dockets. *Supreme Court Proceedings*, U.S. LAW WEEK, Jan. 19, 1993, at 1.

223. See *infra* text accompanying notes 224-227.

224. 19 U.S. (6 Wheat.) 264 (1821).

225. *Id.* at 403:

Justice Brandeis, in *Ashwander v. Tennessee Valley Authority*,²²⁶ however, felt quite differently and listed several conditions where the courts should decline jurisdiction.²²⁷ The courts' ability to decline review could easily stop a challenge to annual deficit spending dead in its tracks.

E. Congress Granting Original Jurisdiction or Standing

An additional method for standing or jurisdiction to be proper before the Supreme Court is through congressional grant. Congress has the ability, through the Constitution, to confer original jurisdiction on the Supreme Court,²²⁸ and may also impose more favorable standing rules.²²⁹ The plaintiff,

[I]t is equally true, that [the Court] must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Id.

226. 297 U.S. 288 (1936).

227. Areas where courts should decline jurisdiction, according to Brandeis, include:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding . . .

2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

4. The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id. at 346-47 (citations omitted).

228. "The Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. See also *Ex parte McCordle*, 74 U.S. 506, 513-14 (1868) (finding that a Congressional act established judicial courts and impliedly granted appellate jurisdiction to the Supreme Court).

229. See, e.g., *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464, 492 n.2 (1982) "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist with-

however, must still satisfy the minimum standing tests: the presence of an actual or threatened injury that is causally connected to the allegedly unconstitutional conduct and that is likely to be redressed by a favorable decision.²³⁰ Satisfaction of these tests will thus meet the Constitutional requirement for a concrete "case or controversy."²³¹

III. ANALYSIS

A court has many methods available by which it may refuse to review a case. Whether this refusal is appropriate has been hotly debated.²³² A challenge to the constitutionality of deficit spending has yet to leap through the justiciability analysis. If such a challenge were brought, how would the courts analyze it? Is deficit spending constitutional? Should the courts elect to review this type of challenge?

A. *Annual Deficit Spending as Envisioned by the Framers of the Constitution*

As stated above, the level of debt prior to implementation of the Constitution was extremely high compared to total national income.²³³ The framers of the Constitution regarded the debt as tolerable only because it was directly related to the cost of war.²³⁴ Accordingly, debt reduction was an extreme "necessity."²³⁵ The framers assumed that the debt would be reduced, and in fact, the debt was reduced by 1849.²³⁶ Thus, one reason the "power to borrow" was not further defined in the Constitution is that the framers did not envision the possibility that deficit spending, would continue on an annual basis.

Members of Congress have acknowledged that the framers of the Constitution did not intend annual deficit spending.²³⁷ Recently, a Congressional committee reported that "[b]oth Hamilton and Jefferson were in agreement, that

out the statute." *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

230. See generally *supra* text accompanying notes 143-208.

231. See *supra* text accompanying notes 152-153.

232. See *supra* text accompanying notes 220-227.

233. See Mikva, *supra* note 16, at 6.

234. See *supra* text accompanying notes 16-20.

235. See *supra* text accompanying notes 17-18.

236. S. REP. NO. 162, 99th Cong., 1st Sess. 1, at 39 (1985).

237. *Id.* at 22.

whatever debt happened to be accrued by a nation, it ought to be repaid within some prescribed period of time. In Jefferson's view, the profligacy of one generation ought not to forever burden its successors."²³⁸

Perhaps this simple analysis is enough to suggest that annual deficit spending is unconstitutional. If so, why does the United States government continue to spend beyond its means? Perhaps this conduct continues because annual deficit spending has not yet been challenged in the courts. The choice to continue deficit spending has therefore been left solely to the legislators. Left unchecked, our congressional representatives will not address the issue head-on, but will continue to spend.

B. *Lack of Means to Enforce a Balanced Budget Allows for Continuation of Deficit Spending*

Congress and the President have tried many ways to curb spending but have been unable to meet their own goals.²³⁹ Without enforceability provisions or the threat of override of the budgetary process, Congress will continue to spend with no repercussions. Mere threats of future economic hardship will never be enough to convince Congress that a balanced budget is a necessity. Any constitutional amendment or legislation must have some type of enforceability provision to ensure that Congress will not simply override the legislation or ignore its existence. As the present system works, Congress is not required to answer to anyone but itself. Surely this is not the balance of powers that our founding fathers envisioned. If Congress cannot control itself, other branches of the government must step in.

C. *Why the Proposed Constitutional Amendments Will Not Work*

The proposals for a constitutional amendment to require a balanced budget, line-item veto, or same-subject restrictions are unworkable. They do not provide for enforceability provisions, they are subject to partisan politics, and they are subject to broad and differing interpretations.

238. *Id.*

239. See generally *supra* text accompanying notes 71-132.

1. *The Balanced Budget Amendment Proposals Are Not the Answer*

A provision requiring a balanced budget through constitutional amendment is both redundant to the Constitution and, without enforceability provisions, unworkable. A constitutional amendment may be redundant because there is indication that Congress in fact believes there is an "unwritten constitution[al]" requirement for a balanced budget.²⁴⁰ Further, our founding fathers expressed the intent that the power to borrow was to be used only when it is necessary.²⁴¹ It would be duplication of effort to adopt an amendment that requires a balanced budget because such a requirement may already exist, considering these statements by Congress and the original intent of the framers of the Constitution. Hence, a constitutional amendment is not the best place to concentrate our efforts.

Provisions that allow Congress to override a balanced budget by a three-fifths vote²⁴² also make a balanced budget amendment unworkable. Congress has historically been especially sensitive to constituency and special-interest-group pressures. Because of these pressures, it may be just as easy for Congress to approve a deficit after a constitutional amendment as it is to currently approve a deficit by majority vote. A three-fifths majority vote does not require many more votes than a majority vote.²⁴³ Conceivably, it would not be too difficult for Congress to shirk its fiscal responsibilities by overriding the constitutional amendment. The only real saving grace may be the public outcry against a representative or senator who votes to continue a deficit year. It is unlikely, however, that the public would become outraged over a "little" matter such as approving a deficit, especially since the American public has become so accustomed to deficit financing.²⁴⁴

240. S. REP. NO. 162 at 3.

241. See *supra* text accompanying notes 16-20.

242. S. REP. NO. 162 at 2.

243. An additional nine votes would be necessary in the Senate and forty-three in the House.

244. The public has become accustomed to politicians breaking the rules. For example, the public was recently able to look past senatorial candidates who bounced hundreds of checks. See Max Boot, *Capital Hill Scandal-Watch Continues After Election*, THE CHRISTIAN SCI. MONITOR, Dec. 15, 1992, at 9. U.S. citizens are well accustomed to budget deficits. In fact, anyone born after

Most significantly, the absence of any enforceability provisions in the proposed amendments make a balanced budget amendment completely unworkable. Unless there is some threat of repercussion, whether it be automatic appropriations cuts or, more appropriately, impeachment from office for not balancing the budget, Congress will continue to accept annual deficit spending, and the deficit will grow.

2. *The Presidential Line-Item Veto*

Although the presidential line-item veto may help to cut some items from the annual budget, the line-item veto cannot be the sole answer to our budgetary woes. Because the President's actions are also subject to partisan politics, it is plausible that the only items vetoed would be those favorable to political opponents, and the President's own party would be unlikely to support an override of such a veto.²⁴⁵ Further, Congress, in anticipation of a potential line-item veto, may "pad" the budget, as legislatures in states with gubernatorial line-item veto provisions are accused.²⁴⁶ If this were to happen, our budgetary woes would be even greater, because the executive branch would be forced to look at the budget as a whole and would also be forced to look for "padded" provisions. With implementation of a line-item veto, Congress may leave the sticky, unpopular decisions to the President and force him or her to make the unpopular spending cuts.²⁴⁷

The balance-of-powers concerns are the most persuasive arguments against the presidential line-item veto. The line-item veto appears to push the executive branch into areas designated by the Constitution to belong to the legislature.²⁴⁸ Where a majority vote was once necessary to pass an appro-

1969 has never experienced a surplus year. See *supra* text accompanying note 25.

245. See *supra* text accompanying notes 113-117.

246. See Devins, *supra* note 63, at 1005-06. See also *supra* text accompanying note 115.

247. Devins, *supra* note 63, at 1006. "[W]hen a legislator, even though opposed in principle to an appropriation, is reasonably certain that the governor will slice it down to more moderate size, he is tempted to bolster himself politically by voting [in favor of the bill]." *Id.* (quoting McGreary, *The Governor's Veto in Pennsylvania*, 41 AM. POL. SCI. REV. 941, 943 (1947)).

248. *Id.* at 1018. "Indeed the transfer of budgetary power from Congress to the President directly undermines majority rule. . . . [S]tructural reform, then, appears a boon to presidential priorities at the expense of legislative prerogatives." *Id.*

priation, the President, unlimited in the number of line items that can be vetoed, in effect could force Congress to approve an indefinite amount of appropriations with a two-thirds vote.²⁴⁹ This could, at the very extreme, completely destroy the constitutional notion of congressional majority rule.²⁵⁰ Because of these separation-of-powers concerns and the threat of padded budgets, the line-item veto does not provide an answer to the nation's financial difficulties.

3. *Same-Subject Limitations*

Much like the line-item veto, same-subject limitations for Congressional appropriations are also not the primary candidates for solving the national deficit problem. Although the provisions may help to prevent legislators from "hiding the ball," defining the term "same subject" is a problem.²⁵¹ The danger with this type of amendment is that the term "same subject" could be subject to substantially differing interpretations by the legislature, the executive, and the judiciary, and no consensus for the definition could be found.²⁵²

Because there may be differing interpretations of the term, it is likely the judiciary would eventually be asked to interpret the meaning of "same subject."²⁵³ If the judiciary elected to apply a strict interpretation of the phrase, the amendment may be successful in squeezing out absurd appropriations that do not conform to the amendment.²⁵⁴ If the judiciary defers to the legislature's interpretation of "same subject," however, which no doubt would be very broad, the amendment may have little or no impact on overall spending. The amendment's goal to keep absurd appropriations out of large bills would be lost, and a large change in the budget process would not occur.²⁵⁵

An additional potential risk of the same-subject limitation is that it could create the fragmented budgetary process

249. *See id.*

250. *See id.*

251. *See supra* text accompanying notes 125-127.

252. *See supra* text accompanying notes 125-132.

253. *See Odishaw, supra* note 108, at 242-44.

254. *Id.* at 246-47.

255. *Id.* at 243. "Thus, the case law reveals that single subject restrictions, though similar in form, may have different consequences depending upon whether the courts within the jurisdiction apply a liberal or a strict standard for defining what compromises a single subject." *Id.* at 243.

that the Act of 1974 intended to eliminate.²⁵⁶ The same-subject limitation may make it more difficult for Congress to put all of the pieces of separate bills together to determine the total budgetary impact. With a concentrated effort on defining the term "same subject," however, application of the amendment may help to prevent the "log-rolling"²⁵⁷ of obscure appropriations hidden in huge umbrella bills.

Of the proposed constitutional amendments, the same-subject limitation seems to cause the fewest separation-of-powers concerns because it encompasses only the legislative branch of the government. A well crafted bill outlining a specific, narrow definition of the term may, at the very least, be a small band-aid for a gushing wound. As with other proposals, the "same subject" limitations must have enforceability provisions or they simply will not work.

D. *Congress Has Provided Its Definition of Appropriate Deficit Spending Through Its Prior Actions*

Considering all of the failed congressional attempts at deficit reduction, including budgetary acts and proposed constitutional amendments, it becomes clear that our current congressional system is incapable of resolving the deficit problem.²⁵⁸ Congress cannot meet its own goals, and its members are not willing to make decisions that could hurt their chances for re-election.²⁵⁹ As a result, deficit spending will continue to skyrocket.

By adopting all of these budgetary actions and proposing constitutional amendments and legislation aimed at the reduction of the public debt, Congress has actually defined the limits of its constitutional power and the associated "necessary and proper" means to further its spending goals. It has, in effect, pronounced it "necessary and proper" to reduce the debt.²⁶⁰ By doing this, Congress has implicitly set a level of review, or benchmark, for the judiciary to use in determining whether the debt is constitutional. In has, in effect, pro-

256. See generally *supra* text accompanying notes 76-82.

257. See *supra* 31 for explanation of "log-rolling."

258. See generally *supra* text accompanying notes 71-132.

259. See *supra* text accompanying notes 71-132. In fact, one member of Congress has gone so far as to say Congress had "done virtually nothing for the last 12 years" to curb deficit spending. 139 CONG. REC. S10533 (daily ed. Aug. 5, 1993) (statement of Sen. Daschle).

260. See, e.g., S. REP. NO. 162, 99th Cong., 1st Sess. 1 (1985).

claimed that deficit spending is wrong, that the government must do something about it, and that Congress is incapable of doing it alone.

Since Congress has defined the meaning of its power to borrow, it has provided a basis for a party to have standing to sue. The party can therefore show more than a generalized grievance, as required by *Flast*,²⁶¹ by pointing to a specific portion of the Constitution that has been violated. The party can allege a direct violation of a specific clause of the Constitution (Congress' power to borrow), and allege that annual deficit spending is inappropriate unless done in emergencies, such as war.

E. *Justiciability Concerns*

For a party to challenge the constitutionality of deficit spending, the traditional notions of justiciability will be considered by the court.²⁶²

1. *Standing*

For a court to review a challenge to annual deficit spending, the party must have standing to sue.²⁶³ A variety of potential litigants would raise different standing issues were they to sue regarding the constitutionality of annual deficit spending. These litigants include individuals and members of Congress.

a. *Individual Standing*

For an individual to challenge the constitutionality of annual deficit spending, the party must be able to show that actual injury resulted from the conduct in question.²⁶⁴ There are several bases for an individual to allege that he or she has been injured by deficit spending. For instance, the party could allege that his or her dollars paid through taxes are used to fund an unconstitutional deficit. Therefore, the percentage of the budget, and the corresponding percentage of his or her taxpayer dollars, were used for purposes resulting in cuts in benefits or programs to the taxpayer, loss of jobs, or loss of spending power. For example, a group, such as busi-

261. See *supra* text accompanying notes 148-151.

262. See *generally supra* text accompanying notes 133-227.

263. See *generally supra* text accompanying notes 143-146.

264. See *Frothingham v. Mellon*, 262 U.S. 447, 486-87 (1923).

ness and banking professionals, may attempt to sue based on increased interest rates due to governmental borrowing.²⁶⁵

The judiciary has been reluctant to allow taxpayers to sue for generalized claims regarding the use of the taxpayers' money for particular projects.²⁶⁶ These cases, however, have attacked specific uses of the funds and specific appropriations.²⁶⁷ Where a litigant attacks a small piece of the budgetary process, injury is even more difficult to prove.²⁶⁸ To avoid standing problems, it would be prudent for the party to allege that *overall* deficit spending is unconstitutional, as opposed to attacking the constitutionality of a specific appropriation. Above and beyond a possible loss of job or cut in benefits, a taxpayer could argue that because fifteen percent of our nation's budget finances the debt, the taxpayer has suffered a significant injury, because fifteen percent of his or her taxes are used to pay the interest on the debt.²⁶⁹ This amount may be more ominous than attacking a specific appropriation, which would be minute once distributed among all taxpaying citizens.²⁷⁰ Fifteen percent of a taxpayer's total amount of taxes paid could be quite sufficient to show an injury in fact.²⁷¹

Although the *Flast* test for taxpayer standing is very difficult to meet, the case of a taxpayer alleging that Congress has exceeded its constitutional limits under the Taxing and Spending Clause may provide the "logical nexus" appropriate to meet the *Flast* standing test.²⁷² Because the taxpayer would be challenging such a large portion of congressional spending funded by a large portion of his or her own tax bill,

265. Crothwait, *supra* note 217, at 1075. However, this argument may not now be appropriate since interest rates are at their lowest in years.

266. See, e.g., *Frothingham*, 262 U.S. at 487. ("The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern.")

267. See, e.g., *id.*

268. See, e.g., *id.*

269. See *supra* text accompanying note 5.

270. Instead of attacking a specific appropriation, "[t]he complaint should be carefully phrased to ensure that it attacks unconstitutional congressional enactment of law and not executive execution of an unconstitutional law." Crothwait, *supra* note 217, at 1079-80 (discussing whether a taxpayer would have standing to sue for enforcement of a balanced budget amendment).

271. For example, a party that pays \$10,000 in taxes has \$1500 appropriated to financing the debt. See, e.g., *supra* text accompanying note 5.

272. *Flast v. Cohen*, 392 U.S. 83, 102 (1967).

the resulting injury is more than sufficient to meet standing requirements, and therefore a "logical nexus" exists.²⁷³ This injury is beyond that of a person alleging just that a constitutional amendment has been violated, because the injury is measurable in dollars and cents, where "the essence of an amendment violation is that Congress spend funds without raising tax revenues."²⁷⁴

If the taxpayer could show that his or her benefits under a program such as Medicare had recently been cut, it would strengthen his or her ability to show a "logical nexus" between annual deficit spending and personal injury. Institutions that receive funds from the federal government may also be able to show a "logical nexus" between an increased debt and cuts in benefits or programs. Taxpayers, or parties affected by budget cuts necessary to finance the deficit, are therefore not just airing generalized grievances, as prohibited by the Court.²⁷⁵

The Court has previously been concerned that allowing taxpayers standing to sue would result in a proliferation of suits.²⁷⁶ The plaintiff, however, would be attacking the overall constitutionality of deficit spending and not just single appropriations; thus, the concern is unjustified. Resolving whether annual deficit spending is constitutional, one way or the other, would solve the problem, and no additional taxpayer suits would be necessary after an initial suit was decided.

Further, the injury must be "likely to be redressed by a favorable decision."²⁷⁷ If deficit spending is found unconstitutional, a party whose Medicare benefits have been cut may find it difficult to argue that the injury will be definitively redressed by a judicial decision. Were a group of citizens with various injuries, however, to sue as a class challenging cuts in multiple benefits that resulted from annual deficit spending, the argument may be stronger that the injuries would be redressed by a favorable decision.

273. *See id.*

274. Crosthwait, *supra* note 217, at 1081.

275. *See generally supra* text accompanying notes 143-146.

276. *See, e.g.,* Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923). *See also, e.g., supra* note 147.

277. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

In this same arena, the courts may also be concerned with what remedy is sought by the plaintiffs.²⁷⁸ Because the courts cannot issue advisory opinions,²⁷⁹ they may be reluctant to prescribe any methods by which a budget should be balanced. Additionally, they may be concerned that there would be additional infringements on other branches of the government from any decision.²⁸⁰ Whoever brings suit must be careful how he or she drafts the request for relief. For instance the plaintiff(s) could urge that the Court issue a pronouncement such as it did in *Brown v. Board of Education*,²⁸¹ asking the courts to make changes "with all deliberate speed,"²⁸² but not prescribing the actual means by which to accomplish the task. The Court in *Brown* recognized that "full implementation of the[] constitutional principles [would] require solution[s]" at the local level.²⁸³ Moreover, a court, in challenging the constitutionality of deficit spending, could relegate the proper method for resolution of the matter to Congress, since Congress is closer to the matter. This would allow the Court to rule on the action, but leave the means for rectifying the situation to Congress.²⁸⁴

b. *Congress Member Standing*

Individual members of Congress could also challenge the constitutionality of annual deficit spending. An appellate court has recognized that "there are no special standards for determining congressional standing questions."²⁸⁵ It appears, however, that if a member of Congress challenged annual deficit spending, he or she would have several distinct standing hurdles to jump. It has been suggested that a member of Congress, alleging unconstitutional conduct on the part of Congress, may be able to assert his or her rights in a judi-

278. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210-11 (1962).

279. See *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 409 (1792).

280. See *supra* text accompanying notes 62-70.

281. 349 U.S. 294 (1955).

282. *Id.* at 301.

283. *Id.* at 299.

284. The courts also may question what a drastic cut in spending would do to the nation's economy; however, one author suggests that the judiciary should not be concerned with economic areas when deciding matters of constitutional import. D. Regan, Remarks at the Hearings H.J. Res. 350 Before the Sub. Comm. on House Judiciary Comm. 97th Cong. 2d Sess. 1 (1982).

285. *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977).

cial arena.²⁸⁶ The member of Congress can allege that his or her rights as a legislator are abrogated by unconstitutional congressional behavior.²⁸⁷

Were a member of Congress to allege that his or her legislative rights have been taken away through the regular use of deficit financing, he or she may have a stronger case, because a challenge to an actual infringement of a congressional right has been previously allowed.²⁸⁸ The courts, however, have been reluctant to redress an issue involving Congress unless that legislator has been denied his or her right to participate in the legislative process.²⁸⁹ If the legislator has had the opportunity to participate in voting regarding the passage of deficit budgets, he or she may find it difficult to allege that a right of participation in the legislative process has been denied.²⁹⁰

As an additional hurdle, the member of Congress will be denied standing if the alleged activity can be redressed by his or her "colleagues."²⁹¹ This particular hurdle may be difficult to surmount because the judiciary, already reluctant to become involved with legislative activities, may see the deficit as an issue that can be addressed by Congress, however unlikely it is that the problem will actually be solved. A well crafted argument, listing all of Congress' failed attempts at solving the deficit problem,²⁹² may help to convince the court that the Congress member's colleagues are completely incapable of redressing the plaintiff's injury, and therefore the courts should consider the challenge.

Another possibility for a member of Congress to sue is based on an alleged injury to Congress itself.²⁹³ It would probably be difficult for the congressional plaintiff to allege that Congress has been injured by its members' conduct, and therefore this argument appears futile. A possible argument, however, that Congress has been severely injured by the deficit could be formulated based on the many hours of time

286. See *supra* text accompanying notes 168-208.

287. See *Harrington*, 553 F.2d at 214.

288. See *e.g.*, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

289. See *supra* text accompanying notes 168-208.

290. See *generally Kennedy*, 511 F.2d at 430.

291. *Riegle v. Federal Open Mkt. Comm.*, 656 F. 2d 873, 877 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

292. See, *e.g.*, *supra* text accompanying notes 71-101.

293. See *supra* note 182 and accompanying text.

spent each year by Senate and House members trying to generate solutions to the budget crisis.

As another allegation of injury, a member of Congress could assert that continued passage of, or overriding of, budgetary items infringes his or her rights to represent his or her constituency.²⁹⁴ Because of issues including injury and separation of powers and the member's ability to access the political process, it may be difficult for the member to urge review of these issues, especially if he or she has participated in the voting process.²⁹⁵

To be allowed representational standing, as required by *Hunt*, the member of Congress would have to meet the tests for associational standing.²⁹⁶ The member could allege that members of his or her constituency would have standing to sue as individuals; they do have a concrete injury, because fifteen percent of the constituents' taxes are being used to finance the debt.²⁹⁷ As a member of Congress, the legislator's interest is in the welfare and fair treatment of all of his or her constituents, and the claim itself does not require participation of the large class of people, as required by *Hunt*.²⁹⁸ In fact, it actually precludes the inclusion of so many litigants, since all taxpayers are impacted by deficit spending. Opponents may argue that participation of the constituents is necessary because so many diverse interests would be represented.²⁹⁹ If, however, the member of Congress represented a narrow band of plaintiffs with the same type of injury claims (for example, loss of Medicare benefits) instead of the entire constituency, it may be more valid to assert these interests, as all these plaintiffs would have the same goals and priorities.

Even if standing is allowed, the courts will still address political question and prudential concerns.³⁰⁰ Questions of separation-of-powers concerns must also be addressed.³⁰¹

294. See *supra* text accompanying notes 198-204.

295. See, e.g., *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

296. See *supra* text accompanying notes 203-204.

297. See *supra* text accompanying note 5.

298. See *supra* text accompanying notes 203-204.

299. See, e.g., *Dessem*, *supra* note 202, at 21.

300. See *supra* text accompanying notes 168-208.

301. See *supra* text accompanying notes 62-70.

2. Political Question

Assuming that standing issues do not bar judicial review, the Court may also apply the political question doctrine to preclude a challenge to annual deficit spending.³⁰² How strictly would the courts apply the political question analysis in a case that involved a challenge to the constitutionality of annual deficit spending? Based upon the political nature of the challenge, it could be expected that the Court's concerns in the political question area would be many.

In the last twenty years, the Supreme Court has actually moved toward a role that involves review of more political questions.³⁰³ In fact, the judiciary has thrust itself into arguably political areas, including presidential immunity,³⁰⁴ budget processes,³⁰⁵ the death penalty,³⁰⁶ and legislative veto.³⁰⁷ In fact, it can be argued that almost every constitutional issue involves broad political concerns.³⁰⁸ It has even been suggested that the political question doctrine may be "ripe for discarding."³⁰⁹ The political question doctrine, however, still remains a large concern to the courts,³¹⁰ and therefore, the issues set forth in this doctrine must be addressed.

In questions of justiciability, the courts often are concerned with whether there are manageable standards for resolving the issue at hand.³¹¹ By using the congressional definition of its borrowing power, the Court can jump this legal hurdle, since Congress has already stated it is "necessary and proper" to reduce the deficit.³¹² Congress has therefore handed the courts a standard for review.

The courts also are concerned about becoming involved in determining governmental policy.³¹³ Again, Congress has given a definition of its fiscal policy by continually reiterating the need for a budgetary balance. As stated above, with its concern about standards for review, the Court need not be

302. See *supra* text accompanying notes 212-219.

303. See Nagel, *supra* note 213, at 650.

304. See *United States v. Nixon*, 418 U.S. 683 (1974).

305. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986).

306. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

307. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

308. Nagel, *supra* note 213, at 668.

309. *Id.* at 668.

310. *Id.* at 668-69.

311. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962).

312. See, e.g., *supra* text accompanying notes 258-261.

313. See *Baker*, 369 U.S. at 217.

concerned that it is making an initial policy consideration, since the determination of a need to reduce the deficit has already been made by Congress and not by the judiciary.³¹⁴

Where an issue is committed to another coordinate branch of government, the judiciary will be reluctant to grant review unless the action directly violates the Constitution.³¹⁵ The Court, however, has recognized that even where issues are committed to a single branch, the Court still must review clearly unconstitutional actions.³¹⁶ Because our founding fathers did not envision continuous deficit spending,³¹⁷ and because Congress has already deemed it inappropriate,³¹⁸ the judiciary *must* review whether the Congress is acting constitutionally in its use of the borrowing power. Even if the Constitution relegates the power to spend and borrow to the Congress, if there is a usurpation of a Constitutional power beyond what was envisioned by our founding fathers, the judiciary must intervene.

If the resolution of the issue would result in a lack of respect for another branch of government, the Court will also deny review.³¹⁹ Although the judiciary may be concerned that a decision regarding the constitutionality of the deficit may embarrass Congress by essentially declaring Congress incompetent, it must realize that Congress has already embarrassed itself by its own budgetary antics. In fact, a decision regarding the constitutionality of the deficit may give new credibility to the federal government as a whole. Congress would then have a definitive benchmark and would be given a final answer to the question whether it should continue to spend above funding. A decision by the judiciary would also provide a measure of accountability for Congress and provide an explanation to the people of the United States why cuts in funding are necessary. As a result, Congress will become a more respected branch of the government. Moreover, embarrassing another branch of government has not been an area of immense concern to the judiciary, as demonstrated by its past pronouncements that can arguably be

314. See *supra* text accompanying notes 258-261.

315. See *Baker*, 369 U.S. at 217.

316. See *supra* text accompanying notes 135-136.

317. See *supra* text accompanying notes 16-20.

318. See *supra* text accompanying notes 258-261.

319. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

viewed as causing embarrassment to other branches of government.³²⁰

The courts will also deny review when they find that a political decision has already been made.³²¹ Actually, this prong of the political question doctrine should convince a court to review a challenge to annual deficit spending. Congress has proclaimed its desire to balance the budget numerous times, yet it has acted in a directly contrary fashion. The Court, therefore, must consider a challenge to deficit spending, since Congress has not made the "political decision" to affirmatively act and reduce spending.

In addition, courts will shy away from adjudication of a particular issue where a decision would potentially conflict with pronouncements of other departments.³²² Again, the judiciary should not be concerned with this prong of the political question doctrine. If the judiciary, however, pronounces annual deficit spending unconstitutional, it will actually have joined the Congress and the executive branch in their belief that it is necessary to reduce, and eventually eliminate, annual deficit spending.

3. *Prudential Considerations*

Finally, a question arises whether the courts will still decline jurisdiction based solely on their own prudential discretion.³²³ Even if jurisdiction and standing are established, a court may elect to decline review.³²⁴ Whether based on separation-of-powers concerns or on issues that are exceedingly controversial or complex, a court may still decide to defer the decision.³²⁵

Courts often deny review of a case when they decide that the "political process" is the best place for resolution.³²⁶ If the processes of the democratic election system will solve the problem, the courts should not get involved.³²⁷ It would be inappropriate for a court to deny review of a challenge to the

320. For example, the Court has declared that a President is not completely immune from the judicial process. *United States v. Nixon*, 418 U.S. 683 (1974).

321. *Baker*, 369 U.S. at 217.

322. *Id.*

323. See *supra* text accompanying notes 220-227.

324. See *supra* text accompanying notes 220-227.

325. See *supra* text accompanying notes 62-70, 220-227.

326. *Goldwater v. Carter*, 444 U.S. 996, 997 (1979).

327. *Id.*

constitutionality of annual federal deficit spending based on the premise that the political process will handle the problem. If the political process could solve the problem, there certainly would not have been a deficit every year for the past twenty years. The political process as it stands today is not working, and consequently, judicial review is required.

Whether a court would elect to review this hot issue is completely questionable. Unfortunately, if review is denied on the basis of prudential concerns, there is nothing that the litigant can do to force the issue. A well drafted, precise pleading, however, may reduce the risks of denial if the complaint articulates the unconstitutionality of spending beyond means and addresses the courts' potential prudential concerns.

F. *Congress Granting Jurisdiction or Standing*

To further convince the court to review a challenge, Congress could confer original jurisdiction on the Supreme Court or relax standing requirements.³²⁸ It seems unlikely, however, that Congress would be able to receive the majority approval required to confer jurisdiction or would even want to pursue the matter, since it would, in effect, be admitting that it cannot solve the problem on its own. Nonetheless, if Congress did confer jurisdiction, the Court may be more amenable to political question concerns.

An argument against a congressional grant of original jurisdiction to the Supreme Court is dependent on how broadly the proposed grant is drafted. In order to be constitutional, Congress cannot give away so much of its powers as to jeopardize the balance of powers between the branches.³²⁹ For example, if Congress gave the Court the power to review specific budgetary appropriations, the Court may deem this too much congressional power in the judiciary, because the Constitution specifically grants this power to Congress. If Congress, however, simply granted jurisdiction to the Supreme Court to determine the constitutionality of overall deficit spending, the Court may be more open to review, since it has declared itself the final determiner of whether congressional actions are constitutional.³³⁰ Original jurisdiction, however,

328. See *supra* text accompanying notes 228-231.

329. See, e.g., *supra* note 91.

330. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

would give the Court a way to get past its political question and prudential concerns, since the grant would coincide with the belief of Congress that the judiciary can constitutionally review this matter.

Congress could also confer more favorable standing requirements to allow a party standing on a particular matter.³³¹ Even if Congress did grant more lenient standing requirements, the Court will still apply a causation test to ensure that the harm alleged is causally connected to the alleged unconstitutional action.³³² If Congress did grant a plaintiff standing as a matter of right to challenge the constitutionality of deficit spending, the plaintiff could then argue that he or she has injury in fact and the injury is causally connected to annual deficit spending.³³³

G. *The Appropriate Level of Judicial Scrutiny*

If the Court did grant review of a challenge to deficit spending, the question remains whether the Court would be as deferential to matters that involve the public debt as it has been with issues regarding congressional interpretations of the Commerce Clause and the Necessary and Proper Clause.³³⁴ A persuasive argument for the Court to apply a higher level of scrutiny than deferential review is difficult to formulate unless the party can show a legitimate usurpation of constitutional power.³³⁵

Therefore, the litigant will have a much better chance if he or she can persuade the court that the action is repugnant to the Constitution. Any act found to be repugnant to the Constitution is void.³³⁶ In scrutinizing the action, the courts must look directly to the Constitution for guidance.³³⁷ As the Court found in *Marbury v. Madison*,³³⁸ the meaning of constitutional phrases is measured by what the framers contemplated.³³⁹ If the meaning of a phrase has not been previously

331. See *supra* text accompanying notes 228-231.

332. See *generally supra* text accompanying notes 143-208.

333. See *generally supra* text accompanying notes 258-261.

334. See *supra* text accompanying notes 48-51.

335. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968).

336. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

337. *Id.* at 176.

338. *Id.* at 180.

339. *Id.*

explained, the court must look to what was contemplated by the framers.³⁴⁰

As previously discussed, the framers of our Constitution were explicit in their belief that the debt should be reduced.³⁴¹ Additionally, Congress has added its interpretation that deficit spending is not appropriate.³⁴² With these two explanations, the judiciary has every tool available to make a decision about the constitutionality of annual deficit spending and the appropriate level of scrutiny to apply.

Further, the courts cannot merely assume that Congress has actually debated and decided that its actions are constitutionally justified. Where Congress has specifically stated that an action is not appropriate, it is especially imperative that the judiciary review the issue with more than a deferential standard. Therefore, the courts must review a challenge to the constitutionality of annual federal deficit spending with a higher level of scrutiny and must not simply defer to the presumption of legislative validity. Congress and the framers of the Constitution have expressly stated that deficit spending is only appropriate during periods of war.³⁴³ It is not appropriate on a continuing basis.

IV. PROPOSAL

The courts should consider reviewing an action challenging the constitutionality of annual deficit spending. A debt that occurs on an annual basis, in the absence of war, is inappropriate and unconstitutional.³⁴⁴ Absent constitutional amendments that include enforceability provisions that cannot be overridden by Congress, the budget will most likely not be balanced without judicial review.

Further, Congress should grant the Supreme Court original jurisdiction to review matters challenging the constitutionality of the deficit in order to show its commitment to solving the deficit problem. In addition, Congress should grant relaxed standing requirements to enable the Court to review the matter. To imagine Congress taking this step is difficult. This step, however, may be the only way in which to address the issue.

340. *Id.*

341. *See supra* text accompanying notes 16-20.

342. S. REP. NO. 162, 99th Cong., 1st Sess. 1, 22 (1985).

343. *See supra* text accompanying notes 16-20.

344. *See supra* text accompanying notes 16-20.

Absent a grant of original jurisdiction from Congress, if the judiciary is asked to review the issue, it need not be concerned with political question issues primarily because Congress and the framers of our Constitution have already expressed an opinion about the appropriateness of annual deficit spending. Consequently, a party attacking the constitutionality of deficit spending is directly attacking congressional power under a specific article of the Constitution. This scenario satisfies the *Flast* test for standing because the party can show a substantial and causally linked injury; fifteen percent of the nation's annual budget goes to financing the debt.³⁴⁵

Unless one of the above political question concerns is applicable, the Court has stated that a challenge should not be dismissed.³⁴⁶ Based on previous congressional interpretations of deficit spending and previous judicial rulings regarding political question concerns, the Court should not dismiss a challenge to the constitutionality of annual federal deficit spending based on political question grounds.³⁴⁷ Further, if Congress were to grant the Supreme Court original jurisdiction to review cases involving challenges to the annual federal deficit, or if it were to grant relaxed standing requirements for this type of question, a court should be even more willing to review such a challenge.

If a group of taxpayers collaborated with a group of congressional members to challenge the constitutionality of annual deficit spending, standing and justiciability questions would be even less problematic. The Court should recognize that Congress and the executive branch are at such an impasse that the basic nature of our government is threatened. A judicial ruling that annual deficit spending is unconstitutional and that the problem be abrogated with "all deliberate speed" may be the only solution. Further, by using this type of order, the Court would not be forced to request an all-or-nothing approach to solving the deficit problem. Therefore, the court need not be concerned with invading the powers of other government branches. A judicial ruling on the constitutionality of annual deficit spending is the only way for parti-

345. See *supra* text accompanying notes 5, 147-151.

346. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

347. See generally *supra* text accompanying notes 302-322.

san politics to be removed from the budget issue and for our country to get back on its economic track.

By applying a stricter test to the power of Congress to borrow, the courts can still bow to the legislators' definition of what is necessary and proper to congressional spending powers. The interpretation of this power may also take into consideration that there may be true emergencies, such as war, where it does become appropriate and therefore "necessary and proper" to spend beyond means. The Court could also suggest a timetable for the reduction of spending, and could compel Congress to set up strict enforceability provisions to ensure that the budget is balanced on an annual basis. This can be accomplished without sending our country into economic hardship from an immediate cut of \$300 billion in fiscal spending.

Although the economic impact of a cut in spending may be problematic, the Court must recognize that a continuation of the current policy could result in catastrophic harm at a later date. It is not equitable that the present generation places such an onerous burden on future generations.³⁴⁸ If spending beyond our means continues, it could literally force our country into bankruptcy.

V. CONCLUSION

Congress, the executive branch, and the judiciary must recognize that Congress, on its own, is incapable of resolving the annual debt. It will take not only the efforts of the legislature and the executive branch, but also those of the judiciary to "get the ball rolling" to financial reform. Current generations and future generations rely on somebody taking the situation to heart and seriously considering the constitutionality of a \$4 trillion debt that continues to grow at a staggering rate. To reduce spending, we cannot continue to allow it to grow. We must all be willing to suffer some pain for long-term gain. To do this, all branches of the government, including the judiciary, must be involved to the limits of their constitutional abilities, and the judiciary should be amenable to considering a challenge to the constitutionality of continuous spending beyond means.

Ondrea D. Riley

348. See generally Lindley, *supra* note 56.